



TC03911

Appeal numbers: TC/2013/07112 & TC/2013/08364

VAT default surcharge - payment made late – temporary insufficiency of funds - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**SOJOURN HOTELS
&
SHIRAZ & NADEEM BOGHANI**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
MR MICHAEL SHARP FCA**

**Sitting in public at Tribunals Service, Tax 45 Bedford Square London WC1B 3DN on
29 May 2014**

Prabu Narayana for the Appellant

Philip Rowe Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

- 5 1. Sojourn Hotels ('The first Appellant') appeals against a default surcharge of £1,691.69 imposed by HMRC on 17 July 2013, in respect of the VAT period ended 30 April 2013, for its failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 2% of the VAT due of £84,585.07.
2. Notification of this appeal was out of time, however HMRC say they have no objection to the appeal being admitted by the Tribunal.
- 10 3. Shiraz and Nadeem Bogani ('The second Appellant') appeal against a default surcharge of £6,970.67 imposed by HMRC on 14 June 2013, in respect of the VAT period ended 30 April 2013, for their failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 5% of the VAT due of £139,413.42.
- 15 4. The appeals are joined to be heard by the same Tribunal by direction of the Tribunal dated 13 March 2014. The second Appellants are the main partners of the first Appellant and share bank facilities with the first Appellant.
5. The point at issue is whether or not the Appellants have a reasonable excuse for making late payments.

Background to the appeals

- 20 6. The surcharge issued to the first Appellant in respect of period 04/13 was originally in the sum of £2,991.63 but was reduced to £1,691.69 following a voluntary disclosure by the Appellant that reduced the amount of tax payable for that period.
- 25 7. The Appellants do not dispute that the tax was paid late, their appeal is that they had a reasonable excuse for the payments being late.
8. Both the first and second Appellants have been in the VAT default surcharge regime from period 10/12.
9. Both the first and second Appellants were on a quarterly basis for VAT. Section 59 of the VAT Act 1994 requires VAT returns and payment of VAT to be made on or before the end of the month following each calendar quarter. [Reg. 25(1) and Reg 30 40(1) VAT Regulations 1995.]
10. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 35 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for electronic filing and payment.

11. In respect of the first Appellant's default as payment was made electronically the due date for the 04/13 period was 7 June 2013. The return was received on 7 June 2013 and the VAT payment on 10 June 2013.

5 12. In respect of the second Appellant's default as payment was similarly made electronically, the due date for the 04/13 period was again 7 June 2013. The return was received on 7 June 2013 and the VAT payment on 12 June 2013.

10 13. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge. Section 59 (7) VATA 1994 sets out the relevant provisions : -

'(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge -

15 (a) the return or as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the commissioners within the appropriate time limit, or

20 (b) there is a reasonable excuse for the return or VAT not having been so despatched then he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question.

25 14. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

'(1) For the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

(a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.'

30 Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

35 15. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

Appellants' contentions

40 16. At the hearing Mr Prabu Narayana appeared for both Appellants. Mr Narayana is the financial Controller of the first Appellant having joined the company in September 2013. Mr Narayana said that the Appellants do not dispute that their VAT payments for the period 04/13 were late.

17. The Appellants' grounds of appeal are that they both had substantial cash flow problems caused by poor trading conditions and a legal dispute which involved significant costs and all of this had a knock on effect in terms of the Appellants' ability to pay their vat on time.
- 5 18. The Appellants bank with Barclays Bank. Collectively they had an authorised overdraft of £315,000 but were overdrawn by £1.97m at the time of the defaults. Shiraz Borgani was close to having a £1.5m personal overdraft sanctioned and that was one of the reasons why the bank had allowed the collective overdraft to substantially exceed the authorised limit.
- 10 19. On Friday 7 July 2013 the combined VAT liability was £224,000 and the bank would not sanction any further unauthorised borrowings. The Appellants therefore had to wait for the weekend's takings to come through in order to make payment to HMRC. The first and second Appellant's VAT payments were made as soon as cash flow permitted but in the event were three days and five days late respectively.
- 15 20. The first and second Appellants agree that neither had asked HMRC for time to pay even though they were aware that arrangements for time to pay can be made, a payment plan having been agreed in respect of an earlier VAT period.
21. Following the defaults both Appellants' returns and payments have been on time.
22. The Appellants say that the defaults arose due to trading difficulties in earlier periods which they have now been able to overcome. However, the circumstances which led to the defaults were beyond their control. Furthermore, had the bank sanctioned the £1.5m authorised personal overdraft sooner than it did and maintained the first Appellant's authorised overdraft at £315,000 it was quite probable that, although the Appellants would still have been over their collective limit, the bank would have allowed the VAT payments to be made on 7 June 2013 and therefore on time.
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HMRC's contentions

23. The period 04/13 had a due date of 7 June 2013 for electronic VAT Payments and Returns. The VAT returns were received on time. As the payments were received late the surcharge was correctly imposed.
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24. Both Appellants entered the Default Surcharge Regime following a default in period 10/12. The first Appellant was on time with its VAT in period 01/13 but the second Appellant was late and a 2% surcharge was imposed.
25. The potential financial consequences attached to the risk of default should therefore have been known to the both Appellants from the information printed on the 10/12 Surcharge Liability Notice.
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26. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

"Please remember: Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000'.

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27. The reverse of each notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

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28. The requirements for submitting timely electronic payments can in any event be found-

- In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.

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- On the actual website www.hmrc.gov.uk
- On the E-VAT return acknowledgement.

29. HMRC say that the surcharges have therefore been correctly issued in accordance with the VAT Act 1994 s 59(4), payments having been received by HMRC after the due date.

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30. With regard to the Appellants grounds of appeal, it is specifically stated in s 71(1) VATA 1994 that any insufficiency of funds to pay any VAT is not reasonable excuse.

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31. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. The Appellants made no contact with HMRC prior to the due dates for payment and did not make any request for a time to pay arrangement.

Conclusion

32. The Appellants were clearly aware of the due date for payment of their VAT and the potential consequences of late payment.

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33. The Appellants' grounds of appeal are that they were suffering cash flow shortages at the time of the default due to earlier trading difficulties which they were endeavouring to overcome. Also their VAT payments were only one and three working days late respectively.

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34. In *Customs & Excise Commissioners v Steptoe* [1992] STC 757 the tax-payer argued that although the proximate cause of his default was insufficiency of funds, the underlying cause of that insufficiency, namely the unexpected failure by a major customer to pay him on time, amounted to a reasonable excuse. The Court determined on a majority that the statutory exclusion of insufficiency of funds as an excuse did not preclude consideration of the underlying cause of insufficiency and that a trader

might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test had to be applied strictly.

5 35. To decide whether a reasonable excuse exists where insufficiency of funds causes
the failure the Tribunal must take for comparison a person in a similar situation to that
of the actual tax-payer who is relying on the reasonable excuse defence. The Tribunal
should then ask itself, with that comparable person in mind, whether notwithstanding
10 that person's exercise of reasonable foresight, due diligence and a proper regard for
the fact that the tax would become payable on the particular dates, those factors would
not have avoided the insufficiency of funds which led to the failures.

15 36. The Tribunal accepts that the underlying cause of the defaults may have been
cash flow shortage. However neither Appellant has been able to provide any
information to show that the cash flow shortage was entirely unforeseeable, outside
the normal hazards of trading or due to events beyond their control.

37. The Appellants could have requested time to pay but did not do so.

38. Legislation lays down the surcharges to be applied in the event of VAT being
paid late and surcharges are applied at a rate fixed by statute and is determined by the
number of defaults in any surcharge liability period.

20 39. The burden of proof is on the Appellants to show that they have a reasonable
excuse for the late payments of VAT for the periods 04/13. In the Tribunal's view, for
the reasons given above, that burden has not been discharged.

40. The appeals are accordingly dismissed and the surcharges upheld.

25 41. This document contains full findings of fact and reasons for the decision. Any
party dissatisfied with this decision has a right to apply for permission to appeal
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009. The application must be received by this Tribunal not later
than 56 days after this decision is sent to that party. The parties are referred to
"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
30 which accompanies and forms part of this decision notice.

MICHAEL S CONNELL
TRIBUNAL JUDGE

35 **RELEASE DATE: 12 August 2014**

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